IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

TUESDAY, THE 13TH NOVEMBER 2007 / 22ND KARTHIKA 1929

AS.No. 387 of 2001()

OS.771/1994 of II ADDL.SUB COURT,TRIVANDRUM
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APPELLANTS/DEFENDANTS 1 AND 2:
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1. **DAMODARAN UNNITHAN, "SANTHOSH",**
   T.C.13/1665, MURINJAPALAM,
   MEDICAL COLLEGE P.O. TRIVANDRUM
   NOW RESIDING AT T.C.26/746-4 OTTUKUZHI,
   TRIVANDRUM.

2. **T.K.SARALA BAI, W/o.DAMODHARAN UNNITHAN,**
   RESIDING AT .DO. .DO.

BY ADV. SRI.R.S.KALKURA

RESPONDENTS/PLAINTIFFS 1 TO 6 AND DEFENDANTS 3 AND 4:
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1. **R.C.JEEVAKUMAR, AGED 46, S/O. CHELLA THAMPI**
   T.C.26/679, OOTTUKUZHI, TRIVANDRUM.

2. **KUNJUMON, S/o GEORGE, T.C.774(1),**
   OOTTUKUZHI, TRIVANDRUM.

3. **CHELLA THAMPI, S/o.RAMAN,**
   T.C.26/679 OF .DO. .DO. (DIED L.R.IMPLEADED)

(IT IS RECORDED THAT THE 3RD RESPONDENT REPORTED DIED AND THE RESPONDENTS 1,5 & 6 ARE THE LEGAL HEIRS OF THE DECEASED R3 AS PER THE ORDER IN MEMO C.F.(DT. 4.4.2000) ON 3.2.2005)

4. **RAJAMMA, D/o. T.C.16/1673, PALAYAM, TRIVANDRUM.**

5. **SISILLY, D/o.SAJAMMA, FLAT NO.1,**
   CHENKALCHOOLA OF .DO. .DO.

6. **LALITHA KUMARI, D/o SARASAMMA,**
   T.C.26/678, OOTTUKUZHI OF .DO. .DO.

**7. CORPORATION OF THIRUVANANTHAPURAM
REPRESENTED BY ITS COMMISIONER,
CORPORATION BUILDINGS, THIRUVANANTHAPURAM.
(3RD DEFENDANT)**

**8. THE TOWN PLANNING OFFICER,
CORPORATION OF THIRUVANANTHAPURAM.
(4TH DEFENDANT)**

**R1 TO 4 BY ADV. SRI.LAL GEORGE
R5 & 6 BY ADV. SRI.R.PRAVEEN
R7 & 8 BY ADV. SRI.N.NANDAKUMARA MENON,SC,TVM CORPN.**

THIS APPEAL SUITS HAVING BEEN FINALLY HEARD ON 13/11/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON C.M.P.No.2742/2001 IN A.S.No.387/2001

DISMISSED

13.11.2007 **Sd/- K.PADMANABHAN NAIR, JUDGE**

TRUE COPY

P.A.TO JUDGE

K.PADMANABHAN NAIR,J

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A.S.No.387 of 2001

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Dated this the 13th day of November, 2007

JUDGMENT

Defendants 1 and 2 in O.S.771/1994 on the file of II Additional Subordinate Judge, Thiruvananthapuram are the appellants. Respondents 1 to 6 filed a suit for declaration and injunction. There were three schedules in the plaint. A schedule property belongs to the first defendant. B schedule property belongs to the second defendant. C schedule property is described as a public road having 4.50 meters width which is situated on the south of A and B schedule properties and lies East-West.

2. The following are the material averments in the plaint. The respondents are residents in the plots situated on the north eastern side of plaint A and B schedule properties. The plaint C schedule property is a public road which is in existence for the last about 60 years and that road is the only mode of access to the plaintiffs for their ingress and egress form their property. The plaintiffs have got an absolute right of easement of necessity

over the same. The plaint A and B schedule properties are situated about 15 meters east from the starting point of plaint C schedule public road. Defendants 1 and 2 started construction of buildings after obtaining licence from the corporation. Along with the building licence they also obtained permit and licence for the construction of a compound wall on the southern side of plaint A and B schedule properties and started construction of the same. They have constructed basement encroaching upon the plaint C schedule public road with a view to reduce the width of the road by 2 meters. Even though the plaintiffs obstructed the unlawful act of the defendants, they continued the construction. Defendants 1 and 2 have influenced the authorities of the corporation of Thiruvananthapuram and obtained a licence and plan to construct a compound wall encroaching upon the plaint C schedule public road to a width of about two meters. The third defendant has no right and authority to permit defendants 1 and 2 to encroach upon the public road and construct a compound wall trespassing in to Plaint C schedule public road. If defendants 1 and 2 complete the construction of a compound wall , the free passage through

the public road will be obstructed. The plan itself was approved with a condition that no encroachment shall be made into the road while constructing the compound wall. The road width was shown as 2.6 meters though the actual width of the road was 4.5 meters. It was falsely shown as 2.6 meters in the plan at the instance of the first defendant. The second defendant also obtained another plan. That plan also clearly shows that there was deviation at the point where the construction of the compound wall commenced. The attempt of the 2nd defendant was to construct the compound wall encroaching into plaint C schedule road to a width of 2 meters. In that plan the width of the road was shown as 2 meters including drain width. That was also a false record obtained on account of the false representation made by the second defendant. In that plan also the road width was shown as 2.5 meters whereas actually it was 4.5 meters. The plans were studiously deviated to circumvent the provisions of law and it was made in violation of law. Those plans are illegal and liable to be set aside. If defendants 1 and 2 are not prevented from erecting a compound wall encroaching upon the pliant C schedule road the plaintiffs will be put to

irreparable injury. The prayer in the suit was to declare the plans and permits were illegal and liable to be set aside and also for a decree of permanent prohibitory injunction restraining defendants 1 and 2 and their agents from encroaching upon the plaint C schedule road in any manner or from making any construction in the C schedule road. A decree of permanent prohibitory injunction restraining defendants 3 and 4 from issuing any licence to defendants 1 and 2 for making any construction in the C schedule road was also sought for.

3. Defendants 1 and 2 filed a joint written statement raising the following contentions. The suit was not maintainable. There was no pathway described as C schedule in the plaint. The description of the pathway was false and mischievous. There was no public road as alleged in the plaint and plaintiffs had no right as alleged or claimed in the plaint. The pathway now seen at the spot was one provided by the defendants and the same was having only a width of 1½ meters on the south of the defendants properties and a width of one meter on the east. The allegation that the pathway was in existence for the last about 60 years was false and hence denied. The plaintiffs had no right

over the pathway and their means of access to the property was not through the disputed pathway. When the defendants started construction of their building and compound wall plaintiffs made an attempt to prevent the construction. The defendants approached the police but on account of the undue influence exerted by the plaintiffs the police did not render any help. Hence the defendants filed O.P.No.6453/1993 before this Court for police protection, impleading respondents 1,2,4 and others. This Court allowed the original petition. So the suit was barred by principles of resjudicata. The description of C schedule road and its width stated are false. The pathway was not having the width as alleged. The C schedule pathway was part of the defendants properties. The permits and licences were issued by the competent authority after conducting necessary enquiries. The suit was filed with a view to coerce and compel the defendants to leave more property from their possession for a pathway according to the whims and fancies of the plaintiffs. The plaintiffs have no right to obstruct the construction. The plan and licence issued by the authorities are legal and therefore, not liable to be set aside.

4. The respondents did not produce any documentary evidence. The first plaintiff was examined as PW1. A Commissioner was appointed to ascertain and report whether there existed C schedule public road on the southern side of plaint A and B schedule properties. The Advocate commissioner visited the spot and prepared Ext.C1 Mahazer. Ext.C1(a) is the report and Ext.C1(b) is rough plan. On the side of the defendants, first defendant was examined as DW1. Exts.B1 to B8 proved and marked. The trial court held that the plans issued to defendants 1 and 2 were liable to be set aside. The plaintiffs were found entitled to a decree of injunction as prayed for. It was also found that C schedule path way is a public road. Challenging the decree and judgment defendants 1 and 2 have filed this appeal.

5. The learned counsel appearing for the appellant has argued that approach made by the trial court was illegal. It is argued that the Court below forgot the fact that the suit was filed by respondents 1 to 6 and it was for them to adduce evidence in support of their case. It is argued that this case pleaded by the plaintiffs is contradictory. It is argued that at one

stage it was averred that the plaintiffs had acquired an easement right by necessity but at another place it was averred that the disputed pathway is a public path way. It is argued that these two averments are mutually destructive and are sufficient to dismiss the suit. It is argued that a person can never claim easement of necessity over a public road. It is argued that the specific case put forward by the defendants was that they had provided a pathway to road from their plots for their use. It is argued that the plaintiffs did not adduce any evidence to show that there exists a public road and that public road was having a width of 4.5 meters. It is argued that even if the report of the Commissioner is accepted in toto the same will only show that on the date of inspection of the commissioner there was a way. It is argued that the commissioner is incompetent to certify the nature of that way and when it came into existence.

6. The plaintiffs did not produce any documents. The defendants produced documents. They produced the title deed in favour of one of the plaintiffs and that document shows that his property is lying on the south of a public road. Though the plaintiffs claimed that their properties were situated on the

north eastern corner of the alleged road there is absolutely nothing on record to show that where exactly their plots are situated. If an alternate pathway is available the plaintiffs are not entitled to raise a claim of easement of necessity. One of the plaintiffs filed Ext.B3 suit. In that suit it was found that the disputed pathway is having only lesser width. In Ext.B1 judgment this Court considered the width of disputed pathway and this Court found that the plaintiffs are not having any property at all in the vicinity of the property of the appellants. It is argued that there is not even a whisper in the evidence of PW1 to the effect that C schedule is a public road. The view of the trial court that since corporation is made a formal party the plaintiffs are handicapped from examining the officers of the corporation or producing documents is illegal. It is for the plaintiffs to establish the fact that C schedule pathway is a public road. It is for them to establish the ingredients and essential to prove the existence of public right. The court below has not considered whether the plaintiffs had established the essentials of a public pathway. The evidence of PW1 shows that 33 cents of property originally belonged to one Madhavan Nair.

Defendants 1 and 2 purchased 15 cents property from him. Their further case was that remaining 18 cents were given as kudikidappu to six kudikidappukars and for the ingress and egress kudikidappu property C schedule pathway was laid. If that case is accepted there was no balance property to form a road. The title deed of the plaintiffs were not produced before the court. Though PW1 had admitted that certificate of purchase was issued to him the same was not produced. Normally the certificate of purchase shall contain a plan and also pathway if any leading to that property. If as a matter of fact such evidence was adduced that would have helped the court to take a proper decision.

7. In this case the only evidence available in favour of the respondents is commissioner's report and plan. The Commissioner's plan will only show that on the date on which the commissioner inspected the property there was a pathway. It will not show whether it is a private pathway or a public pathway. It will not show whether the pathway belongs to defendants 1 and 2 alone. Of course, DW1 had admitted that the pathway having 1½ meters was provided. But that was not

sufficient to hold that there is a public road as claimed by the plaintiffs and that is in existence from more than 60 years. The court below found that there is a public road having width of 4.5 meters without any factual basis. The reasoning of the court below that the plaintiffs cannot site and examine the officers of the corporation or ask them to produce a document was also not correct. The dispute is between the plaintiffs on one side and defendants 1 and 2 on the other side. The corporation was made only a formal party. According to me, the lower court wrongly cast the burden of proof on the defendants. They have no burden to disprove the case of the plaintiffs. The burden to prove the case pleaded is on the plaintiffs and only if they establish the existence of public pathway having width of 4.5 meters the burden will shift to the defendants to adduce the evidence.

Section 563 of the Municipalities Act revise as follows:

> **"Jurisdiction of Civil Courts barred**.- No civil Court shall have jurisdiction to entertain any suit, application or petition challenging the legality or propriety of any action taken by or under the authority of the Secretary under any provisions comprised in Chapters XVII, XVIII and XIX or the rules and regulations, if any, made thereunder."

8. The reliefs 1 and 2 sought for by the plaintiffs are to

set aside the plan and licence issued by the corporation to the defendants. The court below did not consider whether such relief can be granted in view of the stationary bar contained in Sec.563 of the Municipality Act. The court below has also not considered whether right of easement and a claim for public way can co-exist. So I have no other option but to set aside the decree and judgment passed by the court below and remand the case for fresh consideration in accordance with law after giving an opportunity to both sides to amend their pleadings and adduce evidence.

In the result the appeal is allowed. The judgment and decree passed by the court below are hereby set aside. The suit is remanded to the trial court for fresh disposal in accordance with law. The parties shall appear before the court blow on 3.1.2008. I make it clear that I have not expressed any opinion regarding the merits of the contentions raised by both sides. It is open to both sides to raise all contentions available to them before the trial court.

K.PADMANABHAN NAIR, JUDGE

dvs